IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 249 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KHARADI NAGABHAI VELABHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 249 of 1993

MR DN VAKIL for VIJAY H PATEL for Appellant No.

MR RC KODEKAR, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 14/12/2004

ORAL JUDGEMENT

This appeal is filed by the original accused who have been convicted by the learned Addl. Sessions Judge,

Himatnagar, Camp at Modasa in Sessions Case No. 85 of 1991 by judgment and order dated 28th Jan.1993 for the commission of offence made punishable under Secs. 436(2), 452(3), 323, 504, 506(2) and 427 read with Sec.114 of the Indian Pena Code (hereinafter referred to as 'IPC' for short). They have been sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.200/-, in default to undergo rigorous imprisonment for two months for committing offence under Sec.436 of IPC. They have also been sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.100/-, in default to suffer rigorous imprisonment for one month for the offence under Sec.452 of IPC and lastly, they have been sentenced to suffer rigorous imprisonment for six months and to pay a fine of Rs.50/-, in default to undergo rigorous imprisonment for the offence under Secs.323, 504, 506(2) and 427 of IPC. The sentences have been directed to run concurrently.

2. According to the prosecution, the incident took place on 23rd Feb.1991 at village Manda, Tal. Meghraj. One Laxmanbhai, who happened to be the son of Bhurabhai Somabhai of village Arsoda eloped with girl Rangli, daughter of Nagabhai Velabhai of village Manda and they ultimately got married at Ahmedabad. The marriage was a registered marriage. This was not liked by appellant No.1, i.e. father of Rangli. He entertained a doubt that informant Ratnabhai was instrumental in getting the couple married and also to help them in running away. On the day of the incident, because of this reason, the appellants went to the house of Ratnabhai with a view to beat him. At that time, Ratnabhai was sleeping with his family. It was around 11.00 p.m. to 12.00 mid-night. They arrived there raising shouts and also hurling abuses at the informant. They came there and threatened the informant that if did not bring the girl on that night itself, he would be killed. Informant Ratnabhai and his family members were scared. They, therefore, entered their house. They were followed by the appellants inside the house. They were also beaten. In the incident, appellant No.3 gave a stick blow to the wife of Ratnabhai, namely Champaben. With difficulty Ratnabhai and others tried to get out of the house but in the meanwhile, appellant No.2 took a bundle of grass and ignited it with match stick. The appellants started saying that the entire family of the informant should be burnt to death. However, Ratnabhai and others could make their escape good. In the meanwhile, the house was set on fire. Ratnabhai and others raised shouts for help and on hearing the hubbub, several persons from the neighbouring came there for helping the informant. The

appellants started running away from the place, but in the process, they pelted stones towards the informant and his family members. One of such stones hit the son of Ratnabhai, namely, Jivabhai, aged about eight to nine years. Since it was night time, they could not approach the police but on the next day at about 6.00 p.m., the information was lodged with Meghraj Police Station. Upon receipt of the information, the police registered the offence against the appellants and commenced the investigation. During the course of investigation, the police arrested the appellants and produced them before the concerned Court. They were later on released by the learned Sessions Judge on bail. During the course of investigation, the police recorded the statements of Ratnabhai, his wife Champaben, his son Jivabhai and others and also drew necessary panchnama. Upon completion of the investigation, the chargesheet was submitted in the Court of learned Magistrate, who in turn, committed the case to the Court of Sessions, since offence under Sec.435 is exclusively triable by the said Court.

2.1 At the trial, the learned Addl.Sessions Judge, Sabarkantha, Camp at Modasa framed the charge at Exh.3 on 30th Sept.1992. The appellants pleaded not guilty and claimed to be tried.

2.3 At the trial, the prosecution examined 14 witnesses and also produced documentary evidence to support its case. After recording of the evidence was over, the learned Judge recorded the further statements of the appellants under Sec.3113 of Cr.PC. It appears that no specific defence was raised by them, but their defence was of that of total denial. At the end of the trial, the trial Court convicted the appellants and sentenced them to suffer various terms of imprisonment as stated above. It is this judgment of conviction and sentence which is under challenge in this appeal.

3. With a view to re-appreciate the evidence, I have gone through the record of the case as well as carefully considered the submissions advanced by Mr.D.N.Vakil, learned Advocate for Mr.V.H.Patel for the appellants and Mr.R.C.Kodekar, learned APP for the respondent State. According to Mr.Vakil, the judgment and order of conviction and sentence are erroneous since the prosecution has not been able to prove its case against the appellants beyond any reasonable doubt. He further submitted that considering the oral evidence of Jivabhai, who is a child witness, it is very clear that the entire case has been got up since there was enmity. According

to him, this child witness is a tutored witness by one Bhura Kaka for giving evidence in the Court. According to him, the other evidence on record is not at all trustworthy since it suffers from infirmities. Lastly, he has submitted that even if the Court comes to the conclusion that there is error committed by the learned trial Judge, considering the fact that the incident is of almost 12 years old, the appellants may not be sent to prison. As against, Mr.Kodekar, learned APP for respondent State has supported the judgment and has submitted that the case of the prosecution is substantiated with the trustworthy evidence of the eye witnesses and there is no error committed by the trial Court in holding the appellants guilty of committing the aforesaid offence. In his submission, this appeal has no merits and deserves to be dismissed.

4. The prosecution evidence comprises evidence witnesses, panch witnesses and the police officials. Ratnabhai, PW1-Exh29 is the informant. In his evidence before the Court, he has mostly reiterated what has been stated by him in the FIR. According to him, the incident took place about 1-1/2 year prior to the date on which he had given deposition before the Court. He has stated that he knew Bhurabhai, whose son Laxman had run away with girl Rangli, daughter of appellant No.1 and had got married to her. He has further stated that appellant No.1 entertained a doubt that it was he, i.e. the informant who had rendered help to Laxman in running with Rangli. On the night of the incident, the appellants came there and told him that if he did not bring the girl back, they would kill him. So saying, they started beating them. They entered the house and caused injury to Champaben and also set fir to the house. According to this witness, when the police left the place, they also pelted stones which caused injury to his son Jivabhai. In the cross examination it was suggested that he was cousin of Bhura Sama whose son had eloped with Rangli and that there were cross complaint against Bhura Sama and the appellants. He admited that the appellants had given him threat on two to four occasions. He was further asked whether he tried to extinguish the fire which set to his house, but this witness has stated that he was in a helpless condition. Nothing of much importance on the point of the defence has been elicited from this witness. Jivabhai, PW2-Exh.11, is a child witness. He is the son of Ratnabhai, the informant. In the examination in chief, he names all the appellants who came there and who were abusing the informant and others on the day of incident. He also states that appellant No.3 had given blow to the wife of complainant. He further states that

these people had ignited the house. He also states that the appellants had pelted stones and he sustained injury and he has pointed out the injury mark on his forehead to suggest that he received the injury due to the stone pelting. He further states that because of the stone injury, he was bleeding. According to him, when the appellants ignited the house, persons like Hirabhai and Bhurabhai had come there. In the cross examination, however, he states that he did not know who set the house on fire. He further states that one Bhura Kaka tutored him what to say in the Court. However, he immediately states that he had not tutored to say that his mother was beaten and that it was the appellants who set the house on fire. He has stated so because he had seen them doing so. He further states that Bhura and Hira and his father had prepared some papers of the case. He denies the suggestion that the appellants had not entered the house and also that appellant No.3 had not given any stick blow to his mother. Champaben, PW3-Exh.12 is wife of Ratnabhai and mother of Jivabhai. She has deposed on the line of the informant. She has specifically stated that it was appellant No.3 who had given her stick blow on her right hand. She also states that appellant No.2 had set the house on fire. This witness has clearly stated that all the four appellants had entered the house and had belaboured her family members. In the cross examination by the defence, it is tried to be suggested that the house of other witnesses were not in the vicinity and they could not hear the shouts and commotion. She has in detail, described the situation of different houses. She has, by and large, supported the prosecution case and she has been able to withstand the cross examination. Hirabhai Arsoda is PW4-Exh.13. He is uncle of Laxman who had run away with the girl. According to him, the couple had gone to Ahmedabad and had got married which was not liked by appellant No.1. For this reason, appellant No.1 was constantly quarrelling with Ratnabhai, PW1. He further states that he and others went to the house of Ratnabhai on hearing the shouts and commotion. There he saw the appellants were in the house of Ratnabhai and they were beating the inmates of the house. Thereafter they came out. They were also shouting that if the informant did not bring Rangli, they would kill him and so saying, they set fire to the house. According to him, it was appellant No.2 who ignited it. It was suggested by the defence that he gave deposition only because he happened to be brother of Bhura. He has denied it. The witness has not stated anything that could help the defence, but, by and large, he has struck to what he has stated before the police as well as in the examination in chief. Bhura is PW5-Exh.14. He is the father of Laxman,

who had eloped with Rangli. He is an eye witness to the incident. According to him, with a view to arrive at an amicable solution, the Panchayat of the village had met several times. He has denied that he had made any effort to help the victims. Another important witness is Babubhai, PW10-Exh.23. According to him, he was attached to Meghraj Police Station as Head Constable on the day of the incident. On 24th Feb.1991, while he was the Police Station Officer, one Ratnabhai Gumabhai Katara came there at around 6.00 p.m. to lodge the complaint. He recorded the complaint and registered the offence as CR-No.I/91 of Meghraj Police Station. He thereafter sent the complaint to the Head Constable, Incharge of Udva Police out post for further investigation. Natusinh, PW12-Exh.25 is the Investigating Officer. In his evidence, he has narrated in detail the steps taken by him during the course of investigation. He has been cross examined by the defence, but nothing of much importance from the point of view of the defence has been elicited from this witness.

5. Having considered the aforesaid evidence and the ocular evidence, and various panchnamas, it becomes clear that the evidence of Ratnabhai, PW1, his wife, Champaben, PW2 is trustworthy. They have stated about the object and the motive for which the assault was made. They have also spoken about the what has actually happened on that night. Chamben is the injured witness. She has received injury as a result of the blow given by appellant No.3. From the evidence of this witness coupled with the evidence of other neighbours, it is clear beyond any reasonable doubt that it was the appellants who had arrived there at about 11.00 pm - 12.00 midnight on the day of the incident and set the house on fire and had belaboured the informant and his family members. His oral evidence is supported by medical evidence in the form of medical certificate. The scene of offence panchnama shows the fact that because of fire, the house was extensively damaged. When this is so, there is hardly any reason not to believe this witnesses and to throw away their evidence. It is submitted by Mr.Vakil that the evidence of child witness cannot be believed because he does not say the truth and does not say who set the house on fire. There is no difficulty in rejecting the submission because this Court is of the opinion that his evidence is absolutely trustworthy and it has to be accepted in its entirety. It is true that he has not stated who set fire to the house. He has stated all had done it. However, it cannot be overlooked that this witness was aged about eight years at the time when the incident took place. Moreover, it was midnight and when the assault was mounted on the family members,

he was fast asleep. In spite of that, he has named the appellants who came there and caused injury to his mother. He has also named the appellants who pelted stones which resulted into causing injury on his forehead. According to this witness, it was the appellants who had set the house on fire but in the cross examination, he has stated that he did not know who did it. So far as his own injury is concerned, he states that while running away from the scene of offence, at the time of incident, he had fallen down and had received injury. He has also stated that he was tutored by one Bhura as to what has to be deposed in the Court. However, considering his evidence in its entirety, there is nothing wrong with the same and it seems that there is no wrong with this evidence. His evidence clearly supports the prosecution and corroborates the evidence of other witnesses. Merely because he does not state in the cross examination that he set fire to the house, it does not mean that his entire evidence deserves to be thrown away and it destroys the case of the prosecution. On the contrary, major portion of his evidence completely supports the evidence of other witnesses.

It may be noted here that panchnama of the scene of offence was recorded on the next day and it was found that the house was damaged due to fire. It also appears that the damage suffered was to the extent of Rs.5,000/-. In view of the same, there is no doubt in my mind that what the witness has stated was true. The evidence of Champaben is supported by the medical evidence of Dr.Rameshchandra Sheth, PW13-Exh.27. It is adequately reflected in the certificate issued by him what injury she had suffered. Thus, in my opinion, the prosecution was successful in establishing its case beyond reasonable doubt against the appellants.

In view of the aforesaid, now it is required to be considered whether there is any alternative to the sentence of imprisonment that has been imposed by the trial Court. It is rightly submitted by Mr.Vakil that considering the lapse of time, no useful purpose would be served by sending the appellants to prison. Mr.Kodekar, learned APP has not vehemently opposed this submission. In that view of the matter, the submission of Mr.Vakil is required to be accepted. Instead of substantive sentence, ends of justice would meet if the sentence of fine is increased and and some compensation is ordered to be awarded to the victims. It also transpires from the record that the appellants were in jail during the pre-trial stage.

In view of the above, since the appellants were in jail for three days during pre-trial stage, it is ordered that the sentence of rigorous imprisonment of two years and one year and six months for different offences is now reduced to that of three days on all counts, which had already been undergone by the appellants. It is further ordered that instead of fine of Rs.200/-, the same is increased to Rs.2,000/- (Rupees Two thousand only) for each of the appellants on all counts. It is further directed that if the fine is paid, Rs.7,000/(Rupees Seven thousand only) be paid to informant Ratnabhai Gumabhai Katara and his wife Champaben Ratnabhai by the trial Court after due verification. It is also directed that the appellants shall pay the fine within a period of four months from the date of this judgment, failing which, the original order of sentence passed by the trial Court will stand restored. With the aforesaid alterations, this appeal is dismissed.

(Akshay H.Mehta, J.)

Sreeram.